IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Appeal No. 770 of 2001
(Old No. 1962 of 1991)

Date of decision : 17th August, 2007

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date : 17-08-2007 Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARAKHAND, AT NAINITAL

Criminal Appeal No. 770 of 2001
(Old No. 1962 of 1991)

1. Misri Lal S/o Sumeri Lal Sharma
2. Smt. Saraswati W/o Late Lala Ram
   R/o Ward no. 02, Sitarganj,
   P.S. Sitarganj,
   District: Nainital ....Appellants

Versus

State .....Respondent

Delivery of Judgment : 17th August, 2007

Mrs. Pushpa Joshi, Advocate with Mr. Amit Kapari Advocate for appellant No. 1.
Mr. P.S. Danu, Amicus curiae for appellant No. 2.
Mr. G. S. Sandhu, Government Advocate with Mr. B.S. Parihar Brief Holder for respondent.

Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble J. C. S. Rawat, J.

Per:- Hon'ble J.C.S. Rawat, J.

This criminal appeal has been filed against the judgment & order dated 25.09.1991 passed by Sri R.N. Singh, the then First Addl. Sessions Judge, Nainital in S.T. No.293 of 1989 whereby the appellant Misri Lal was convicted and sentenced to undergo imprisonment for life and for a period of six monts' R.I. under section 302 IPC and section 201 IPC respectively. Both the sentences were to run concurrently. Appellant Smt. Saraswati was convicted and sentenced to undergo imprisonment for life under section 302 IPC read with section 34 IPC.

2. The facts, in nutshell, are that the deceased Lala Ram was living with his wife Smt. Sarawati and his children in Ward No. 2, Kasba & P.S. Sitarganj. Appellant Misri Lal was tenant in the house of the deceased. Ram Bhan Singh PW1 was also living in the house of the deceased as tenant. Smt. Saraswati- the

wife of the deceased had an illicit relationship with the appellant-Misri Lal. In the intervening night of 22/23.12.1988, the deceased Lala Ram alongwith his wife and children was sleeping in the house. In order to commit the murder of Lala Ram, appellants Misri Lal & Smt. Saraswati hatched a conspiracy and they committed the murder of Lala Ram. After sometime, Smt. Saraswati cried loudly and on this Ram Bhan Singh came near the room of Smt. Saraswati and found Lala Ram lying dead in the 'varanda'. Ram Bhan Singh asked her as to who has committed the murder of Lala Ram. She replied that she did not know about it as she was sleeping. She further replied that when she came out of the room to ease her child, she found her husband lying dead in the varanda. Deceased Lala Ram had made an agreement of Rs. 1,50,000/- in favour of Kedar Dutt to sell the agricultural land, due to this reason the appellants were annoyed with the deceased. Thereafter, C. B. Bhatt scribed the report on the dictation of Ram Bhan Singh PW1-informant in the same night. Ram Bhan Singh PW1 went to the police station where he lodged the FIR (Ex.ka.1) on 23.12.1988 at about 1am. On the basis of report, a Chick FIR was prepared and necessary entries were made in the general diary. The investigation of this case was entrusted to S.I.-S. P. Singh, who immediately visited the spot. After appointing panches he prepared the inquest report and other connected papers. The dead body of the deceased was sent to the hospital for autopsy. The police recovered the blood stained *'Darati'* (sickle) and clothes of the appellants on the pointing of accused Misri Lal. After completing the

investigation, the Investigating Officer submitted the chargesheet before the court against the appellants.

3. After submission of chargesheet the appellants-accused were committed to the court of Sessions for trial and the trail court framed charges against the accused persons. They denied the charges levelled against them and claimed their trial.

4. The prosecution in support of its case examined nine witnesses. Ram Bhan Singh PW1 is the informant of this case. He was the tenant in the premises of his landlord-deceased. Seva Ram PW2 has proved the factum of recovery of *'Darati'* and blood stained clothes of appellants. Kedar Dutt PW3 stated that an agreement of agricultural land by the deceased was executed in his favour. The prosecution has adduced the evidence of Latif PW4 who is the witness of taking sample of blood-stained soil from the place of occurrence. Dr. Anil Sah PW5 is the medical officer, who conducted the postmortem on the dead body of the deceased. Constable Fateh PW6 is the formal witness of the police. The prosecution has also adduced the evidence of Shakil Ahmad PW7 before whom the extra-judicial confession was made by the appellant Saraswati – wife of the deceased. S.I.-Vijendra Sharma PW8 is the Investigating Officer and he has submitted the chargesheet against the accused persons. Satyapal Singh PW9 is the investigating officer prior to Vijendra Sharma PW8 in this case.

5. The accused persons were examined u/s 313 Cr.P.C. and they have pleaded not guilty to the offence.

They have stated that they have been falsely implicated in this case.

6. The appellants in the trial eventually were convicted and sentenced by the trail court a mentioned above.

7. We have heard learned counsel for the appellants and learned Government Advocate for the respondent-State. Perused the record carefully.

8. At the outset, it needs to be mentioned here that it is not disputed that the deceased Lala Ram died on account of ante-mortem injuries sustained by him on the date of occurrence. Dr. Anil Sah (PW5), Medical Officer conducted the postmortem of deceased on 23.12.1988 at 3:30p.m and found following ante-mortem injuries on the person of the deceased.

(i) Incised wound 18cm x 4cm x vertebral column deep across the upper part of the neck, extending from 2cm below left lobule of ear upto 2cm below right angel of mandible outer right side of neck.

(ii) Incised wound 4cm x 1.5cm x bone Deep on the front slightly left side of head 10cm above the left eye brow, present transversely.

(iii) Incised wound 4cm x 1cm muscle deep outer base of nose both above wound extending upto medial level of left & right eye brow.

(iv) Incised wound 4cm x 1.5cm x scalp deep on the post. aspect of head 10cm from the left ear, present transversely.

(iii) Incised wound 6cm x 2cm. Bone deep present obliquely on the front of left wrist joint.

In the opinion of Medical Officer, the death of the deceased was caused due to shock and excessive bleeding resulting from the ante-mortem injuries. The medical officer has proved the postmortem report Ex.ka.5. He has opined that the aforesaid injuries could be caused by sharp edged weapon like sickle. Dr. Anil Sah, Medical Officer found at the time of autopsy that the death of the deceased occurred within one day. Thus, it is amply established that deceased met a homicidal death on account of ante-mortem injuries sustained by him.

9. Now, we have to consider as to whether the appellants were responsible for causing the death of the deceased. There was no eyewitness of the incident and the prosecution case rests upon circumstantial evidence. The law which is fairly settled about circumstantial evidence is that it should be such as to point out only to the guilt of the accused. The evidence should exclude all other hypothesis except the guilt of the accused. It is often said that though witnesses may lie, circumstances will not but at the same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. In order to sustain conviction on circumstantial evidence, each of the incriminating piece of circumstantial evidence should be proved by cogent and reliable evidence and the court should be satisfied that the piece of evidence taken together forge such a chain wherefrom no inference other than the guilt can be drawn.

10. The Hon'ble Apex Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra (AIR 1984 SC 1622)** while dealing with circumstantial evidence, has held that onus is always on the prosecution to prove that the chain is complete. The condition precedent before conviction could be based on circumstantial evidence were enumerated as under :-

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) They should exclude every possible hypothesis except the one to be proved; and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

The above decision was also followed in the decisions of the Hon'ble Apex Court in **State of**

Rajasthan vs. Rajaram 2003 Cri.L.J. p/3901, State of U.P. Vs. Satish 2005 SCC (Cri) 642 and Ram Singh Vs. Sonia & others 2007 (3) SCC 1.

11. Before proceeding further, it needs to be mentioned here that so far as the motive of the crime is concerned, the prosecution has not alleged as to why the appellant Misri Lal has committed the murder of the deceased. It is admitted to the parties that the appellant Saraswati Devi is the wife of Lala Ram and Misri lal is a tenant in the same house. It was contended on behalf of the appellants that the prosecution has taken a case that the appellant Saraswati had an illicit relationship with the appellant Misri Lal, as such, they committed the murder of Lala Ram. But, the prosecution has not led any evidence to that effect. The prosecution has also adduced the evidence that Lala Ram executed an agreement of his land on 21.09.1988 in favour of Kedar Dutt PW3 and he received a sum of Rs. 5000/- towards the consideration of the said agreement. The prosecution has not led any evidence as to how the appellants were annoyed with this agreement. The prosecution has also not connected the said agreement with the commission of crime. Thus, the prosecution has miserabley failed to prove the motive of the crime.

12. Now, we will discuss the individual case of each appellant separately. At the first instance, we will examine the circumstances projected by the prosecution against the appellant Misri Lal.

13. The first circumstance projected against the appellant Misri Lal is that the appellant Misri Lal had been living in the premises of the deceased as tenant. The appellant Misri Lal and Saraswatti the wife of the deceased were talking with each other loudly in the 'varanda' at about 7:30pm on 22.12.1988. This fact has been deposed by Ram Bhan Singh PW1, who has deposed in his evidence that he was also a tenant of Lala Ram-deceased. He has further stated in his evidence that Misri Lal had also been living in the same house as a tenant on the date of incident. The appellants Misri Lala and Saraswati were speaking loudly in the early hour of night on 22.12.1988. When he went to their room he found that they were talking with each other and they were consuming liquor. Ram Bhan Singh PW1 is the informant of this case. He has further stated that in the night 22/23.12.1988 the wife of the deceased cried loudly inside her room. On hearing the cry of Saraswati-appellant, he woke up and went towards the room of Lala Ram-deceased where he Found the dead body of Lala Ram lying in the varanda. On being asked, the wife of the deceased informed him that she was sleeping in her room and when she came outside to ease her child she found her husband lying dead in the varanda. Thereupon, Ram Bhan Singh dictated the report to the scribe and lodged the same in the police station. This witness was cross examined at length by the defence. Ram Bhan Singh PW1 has stated in his cross examination that the fact of consuming liquor by Misri Lal and Lala Ram in the varanda before the incident at about 7:30pm on 22.12.1988 has not been recorded in the first information report. This fact did not find place in the

first information report which was lodged by Ram Bhan Singh PW1. Apart from this, his statement under section 161 Cr.P.C. was recorded by the I.O, who has stated that he had not stated this fact to him. Though, the I.O. has stated in his evidence that he had stated this fact to him in his statement under section 161 Cr.P.C. If this fact has not been narrated by the witness then how the I.O. has recorded the said fact. It becomes doubtful. It leaves no room for doubt to discredit his testimony on this point. Assuming that Lala Ram deceased and appellant Misri Lal were sitting in the varands before the incident it would not be an incriminating circumstance because Lala Ram and Saraswati Devi were the husband and wife and the appellant Misri Lal was a tenant of Lala Ram in the same house. Merely sitting in the varanda together and consuming liquor would not lead to the inference that the appellants assembled there to commit the murder of Lala Ram. It is also not in the evidence that they were quarreling with each other or they were threatening that the appellants Misri Lal and Saraswati would kill Lala Ram. In view of this, the above circumstances cannot be taken into consideration as incriminating against appellants Misri Lal and Saraswati.

14. The other circumstance which has been projected by the prosecution against the appellant Misri Lal is that a the instance of Misri Lal, one Darati (sickle) and blood stained clothes including *"Jarsi, gents underwear, ladies Dhoti and a patikot of appellant Saraswati"* were recovered. The prosecution has adduced the evidence of Sewa Ram PW2 and S.I. Satyapal Singh PW9 (I.O.).

S.I. Satyapal Singh PW9, Investigating Officer has stated in his evidence that the accused Misri Lal told him that he had concealed the 'sickle' by which he committed the murder of the deceased and he could also recover the blood stained clothes if he was taken to the place where these articles have been concealed by him. The appellant Misri Lal was taken to the east of the courtyard of Lala Ram where there was a heap of straw. The appellant Misri Lal discovered the sickle and above articles from there. Misri Lal then handed over the recovered articles to the I.O. The I.O. prepared the memo of the seized articles at the spot. Sewa Ram PW2 has also corroborated this fact in his evidence. Sewa Ram PW2 had stated in his evidence that at about 2pm on 23.12.1988 when he went to the house of Lala Ram he came to know that Lala Ram has been murdered and the appellant Misri Lal was in the custody of the police. In his presence, the appellant Misri Lal made the discoveries of the aforesaid articles. The memo Ex.ka.2 of the seized articles was prepared at the spot. He had also signed on the said memo. He has stated in his cross examination that the blood stains were present on the handle of *Darati.* Satyapal Singh PW9 I.O. and Sewa Ram PW2 had corroborated that fact that the 'Darati' was recovered at the instance of appellant Misri Lal. These witnesses have been cross examined at length but nothing could be elicited in their evidence to discredit the fact that the aforesaid articles were not recovered at the pointing out of appellant Misri Lal. It is also pertinent to mention here that the blood stained clothes and *Darati* were not sent to the serologist so that it could be ascertained that it was the blood of the deceased. It is also pertinent to

mention here that the blood group of the deceased was not matched with the blood group found on the recovered articles.

15. The other circumstance projected by the prosecution against the appellant Misri Lal is that there is an extra judicial confession of Saraswati made before Shakil Ahmad PW7. To prove this fact, the prosecution has adduced the evidence of Shakil Ahmad PW7 who has deposed in his evidence that he was the neighbour of the deceased. He resides in the same vicinity where the deceased had been residing. He had stated in his evidence that the appellant Saraswati came to his house at about 4a.m in the morning of 23.12.1988 and fell on his feet. She told him that she had committed the murder of her husband at the behest of Misri Lal. She has further stated to him that she caught hold the legs of her husband and the appellant Misri Lal assaulted on his neck with Darati. Shakil Ahmad PW7 has stated as follows:

> "लगभग 2 1/2 साल की बात है सुबह 4 बजे करीब का समय था। मेरे पास लालराम की बीबी आई। उसने मुझे आवाज दी। जब मैंने दरवाजा खोला तो वह मेरे पैरो मे गिर गई और कहने लगी मैने गलती से मिश्रीलाल के कहने पर अपने पति लालाराम को कत्ल कर दिया। मेरे घर पुलिस आई है। मुझे बचा दिजिए। मैंने लालाराम के पैर पकडे और मिश्रीलाल ने लालाराम की गर्दन पर दराती चला दी।

16. Thus, the appellant Saraswati had made an extra-judicial confession implicating herself and the appellant Misri Lal for committing the murder of the deceased Lala Ram. Now the question arises as to whether such confession implicating herself and Misri Lal in the

commission of offence is admissible against the appellant Misri Lal. Section 30 of the Indian Evidence Act provides as under:-

> **Section 30. Consideration of proved confession affecting person making it and others jointly under trial for same offence.-** When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.
>
> Explanation:- "Offence", as used in this section, includes the abetment of, or attempt to commit, the offence.

17. In view of above, before a statement by one of the accused persons can be taken into consideration against the other accused, the following conditions must be fulfilled:-

(i) There must be a joint trial for the same offence

(ii) It must be a confession.

(iii) The confession of guilt must affect himself and the others, i.e. impliate the maker substantially to the same extent as the other co-accused.

(iv) The confession of guilt must be duly proved.

18. It is apparent from perusal of above that both the accused persons must be tried jointly for the same offence. It is also essential from the perusal of the above provision that it goes without saying that such statement must also implicate the co-accused to the

same extent as the maker. It is also well settled position of law that this section does not provide that such confession is evidence; still less does it say, that it may be the foundation of a case against the person implicated. The extra-judicial confession of an accused person is not evidence against a co-accused in the sense that conviction on that alone could be supported. It could only be taken into consideration.

19. Under section 30 of the Indian Evidence Act, the phrase used in the section is that ”it may be taken into consideration”. Perusal of the aforesaid section clearly reveals that it is not an evidence as provided under the Indian Evidence Act. In dealing with the confession of a co-accused, the Court must begin with other evidence produced by the prosecution and after it has formed its opinion as to the quality and effect of that evidence, then it is permissible to turn to the confession in order to receive assurance to the conviction of guilt. The confession of the co-accused cannot be treated as substantive evidence. When the substantive evidence is not sufficient to establish a prima-facie case, the confession cannot be used against the co-accused. It can only be used to lend assurance to the conclusion arrived at on the other evidence about the accused’s complicity in the crime. It can in no case be used to fill up gap in the prosecution case. The evidence of section 30 against the co-accused is of too weak a character to form the basis of conviction. The words “may take into consideration” used in the aforesaid section connote the idea that there must be other material beside the confession of a co-accused to form the basis of conviction.

20. In the case of **State of M.P. Vs. Paltan Mallah & others 2005 SCC (Cri) 674,** the Hon'ble Apex Court has held as follows:-

> *"18. Another incriminating circumstance sought to be proved against the accused is the extra-judicial confession alleged to have been made by the ninth accused Paltan Mallah wherein he named A-1, A-2, A-5 and A-6. It is alleged that he made the confession to PW 105 Satyaprakash Nishad and A-9 is alleged to have disclosed to PW 105 that these accused persons had given him money and he murdered Shankar Guha Niyogi for the sake of money. Under Section 30 of the Evidence Act, the extra-judicial confession made by a co-accused could be admitted in evidence only as a corroborative piece of evidence. In the absence of any substantive evidence against these accused persons, the extra-judicial confession allegedly made by the ninth accused loses its significance and there cannot be any conviction based on such extra-judicial confession. The High Court, in our view, has given cogent and satisfying reasons for the acquittal of the accused A-1 to A-8. We do not find any reason to interfere with such a finding, ..."*

21. In view of the above discussion, it is apparent that it is not independent evidence. It is also evident that this fact cannot be taken into account to fill the gap in the prosecution evidence. If the other evidence produced by the prosecution is found credible and cogent to convict the accused then it can lend an assurance to other relevant evidence bearing on the

accused's complicity in the crime. AS we have noticed earlier that the prosecution has been able to prove the only circumstance that a recovery of articles was made against the appellant Misri Lal. If there is no other prosecution evidence against the guilt of the co-accused, the evidence of Sewa Ram PW and Satyapal Singh PW9 I.O. to establish the recovery of the articles by themselves would not take the prosecution case any further. In the case of **State of M.P. Vs. Kriparam 2005 SCC (Cri) 830,** the appellant and two others were charged under section 302/34 IPC for committing the murder. The prosecution alleged that three accused persons attacked the deceased with deadly weapons and the deceased died instantaneously. During the course of investigation, the prosecution alleged that it recovered blood-stained clothes worn by the accused as also blood-stained axe which was used in attacking the deceased. The trial court convicted all three accused persons under section 302/34 IPC. In appeal, the High Court on re-appreciation of the evidence came to the conclusion that the prosecution has failed to establish the case against the accused, hence acquitted the accused. When the matter came before the Hon'ble Apex Court, it has been held that there were two eyewitnesses of the incident and they were found unreliable. The prosecution also led the evidence of the recoveries allegedly made at the instance of the accused. The Hon'ble Apex Court has held as follows:-

> *"10.Similar is the case in regard to recovery of an axe. In regard to this, witnesses for the recovery say, they found a small stain of blood on it. The serologist in regard to this blood also states that it is not possible to find out the origin of the same. Therefore, even this recovery would not in any manner help the prosecution in this*

case. Even otherwise, if the prosecution case in regard to PWs 1 and 3 is not acceptable then these recoveries by themselves would not take the prosecution case any further."

22. After perusal of the entire evidence and the circumstances projected by the prosecution, we are of the view that the prosecution could not establish the case against the appellant Misri Lal. It is true that the conviction can be based solely on the circumstantial evidence but it should be tested on the touch stone of law relating to circumstantial evidence. The circumstantial evidence must be as such which the conclusion of the guilt is to be drawn should in the first instance be fully established, and all the facts for established should be consistent only with the hypothesis of the guilt of the accused. When the evidence on record is analyzed in the background of the principles highlighted above, the inevitable conclusion is that the circumstances projected by the prosecution against appellant Misri Lal are not consistent with the hypothesis of the guilt of the accused.

23. Now, we will examine the evidence against the appellant Saraswati. The first and foremost circumstance projected by the prosecution against the appellant Saraswati is that she made an extra-judicial confession before Shakil Ahmad PW7. As we have already pointed out that she went to the house of Shakil Ahmad PW7 in the morning at about 4a.m. and stated to him that she caught hold the feet of her husband and the appellant Misri Lal assaulted on his neck by Darati. Shakil Ahmad PW7 is also a close neighbour of the deceased and appellants. It is also in the evidence of Shakil Ahmad PW7 that after making

the extra judicial confession before him he went to his fields to look after his crop. Thereafter, he came to the house and found that the police was there. He informed the police at about 10am on 23.12.1988 that the appellant Saraswati has confessed her guilt before him. This witness has stated in his cross examination that he resided in the vicinity of appellants. He had admitted in his cross examination that the appellant Saraswati never came to his house for any work before the date of incident. The appellant Saraswati used to visit the house of Rampal and Bhujia whose houses were adjacent to the house of the deceased. He has further admitted that generally he did not visit the police station. When anybody who had some work at 1p.m. in the night. S.I. Satyapal Singh PW9 I.O. has stated that immediately after receiving the information he reached at the spot and started the investigation of the case. Shakil Ahmad PW9 has stated in his evidence that his two sons were also present in the room when the appellant Saraswati came to his house and confessed her guilt before him. He had further stated in his deposition that he went to his fields where he narrated about the confession of the appellant Saraswati to the persons working in the fields. He has further stated in his evidence that after hearing the confessional statement of the accused he did not think it proper to go to the police or the place of incident. Shakil Ahmad PW7 is the resident of the same vicinity where the deceased and the appellants were residing. Having heard the confessional statement of appellant Saraswati, this witness allegedly proceeded to his fields

in the morning and at about 10am after attending his fields he reached at the place of occurrence where he informed the I.O. about the extra-judicial confession made by the appellant Saraswati. It is also in the evidence that the police was there immediately after recording the FIR. She could have confessed the guilt before the police. If we analyze his evidence we note that this witness seems to have taken the information of the murder rather than indifferently. He was the neighbour of the deceased. Inspite of the same, the police was in the house of appellant Saraswati but he did not bother to inform the police. On the contrary he went to the fields. We find some amount of artificiality in the evidence of this witness. The appellant Saraswati did not have any special reason to make her confession before Shakil Ahmad PW7 which is clear from the evidence of Shakil Ahmad PW7. Apart from this, the police was present at the place of incident. There was no reason for the appellant Saraswati to leave her house and to go to the house of Shakil Ahmad PW7 where she never visited before the incident for any work. In this background, the statement allegedly made by the appellant Saraswati as an extra-judicial confession, in our opinion, it is not safe to rely on the same. Thus, the prosecution has failed to prove the extra-judicial confession.

24. The other circumstance projected against the appellant Saraswati is that as the appellant Saraswati and Lala Ram were alone in the house, it was obligatory on the part of the appellant Saraswati to explain as to how and in what manner the deceased Lala Ram sustained the injuries on his person. The

appellant Saraswati has taken a case right from the beginning that in the night when she came outside to ease her child she found the dead body of her husband lying in the varanda. She cried loudly and Ram Bhan Singh PW1 reached at the spot. She stated to him that her husband has been murdered by someone. She has stated in her statement under section 313 Cr.P.C. that she kept the head of her husband on her lap due to which her clothes came in contact with the blood oozing from her husband. The I.O. has taken possession of the clothes in the police station. She has further stated that Shakil Ahmad PW7 wanted to grab the property of her husband and that is why she has been falsely implicated in this case. The site plan clearly reveals that she was sleeping inside the room and it is not the case of the prosecution that the husband of Saraswati was sleeping with his wife. The dead body has been shown lying outside the room and it is alleged that the complainant was sleeping near the dead body. It is apparent that there is no evidence that both were sleeping together on the date of incident. It is also in the FIR which was lodged on the basis of the information received from the appellant that when she came out from her room to ease her child she found her husband lying dead in the varanda. In these circumstances, it cannot be held that the appellant Saraswati has not given plausible explanation as to how she parted with the company of her husband. Thus, the prosecution has not proved the case against the appellant Saraswati also.

25. In view of the above discussion, we hold that the prosecution has failed in establishing the guilt, beyond

reasonable doubt, against the appellants. We find that the learned trial court has erred in convicting and sentencing the appellants. Hence, the appeal is allowed and the conviction and sentence against the appellants awarded by the trial court are set aside. Bail bonds of appellant Saraswati are cancelled and sureties discharged.

26. Appellant Misri Lal is in custody. He be set at liberty forthwith if not wanted in connection with any other case.

27. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within two months.

(J.C.S. Rawat, J.) **(Rajeev Gupta, C.J.)**

Dated 17th August, 2007
LSR